No. 06-730

In The
Supreme Court of the United States

STATE OF WASHINGTON; ROB MCKENNA, Attorney General; SAM REED, Secretary of State,

Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY; CHRISTOPHER VANCE; BERTABELLE HUBKA; STEVE NEIGHBORS; BRENT BOGER; MARCY COLLINS; MICHAEL YOUNG; DIANE TEBELIUS; MIKE GASTON; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; PAUL BERENDT; LIBERTARIAN PARTY OF WASHINGTON STATE; RUTH BENNETT; J.S. MILLS; WASHINGTON STATE GRANGE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV, § 1, cl. 2 provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

WASH. CONST. art. II, § 15 provides, in part:

> Such vacancies as may occur in either house of the legislature or in any partisan county elective office shall be filled by appointment by the county legislative authority of the county in which the vacancy occurs: *Provided*, That the person appointed to fill the vacancy must be from the same legislative district, county, or county commissioner or council district and the same political party as the legislator or partisan county elective officer whose office has been vacated, and shall be one of three persons who shall be nominated by the county central committee of that party. . . . *Provided,* That in case of a vacancy occurring after the general election in a year that the office appears on the ballot and before the start of the next term, the term of the successor who is of the same party as the incumbent may commence once he or she has qualified and shall continue through the term for which he or she was elected. . . .

WASH. REV. CODE § 29A.04.086 provides, in part:

> "Major political party" means a political party of which at least one nominee for president, vice president, United States senator, or a statewide

> office received at least five percent of the total vote cast at the last preceding state general election in an even-numbered year. A political party qualifying as a major political party under this section retains such status until the next even-year election at which a candidate of that party does not achieve at least five percent of the vote for one of the previously specified offices. . . .

WASH. REV. CODE § 29A.52.311 provides, in part:

> Not more than ten nor less than three days before the primary the county auditor shall publish notice of such primary in one or more newspapers of general circulation within the county. The notice must contain the proper party designations, the names and addresses of all persons who have filed a declaration of candidacy to be voted upon at that primary. . . .

WASH. REV. CODE § 42.17.020(10) provides:

"'Caucus political committee" means a political committee organized and maintained by the members of a major political party in the state senate or state house of representatives."

WASH. REV. CODE § 42.17.640(2) provides, in part:

"No person, other than a bona fide political party or a caucus political committee, may make contributions to a candidate for a state legislative office or county office that in the aggregate exceed seven hundred dollars. . . ."

WASH. ADMIN. CODE § 434-215-015, prior to the July 19, 2005 injunction, provided in part:

> NEW SECTION
>
> WAC 434-215-015 Political party preference and independent status. A candidate for partisan office who files a declaration of candidacy properly must appear on the primary election ballot, regardless of the candidate's party preference or independent status. . . . [N]either endorsement by a political party nor a nominating convention are [sic] required in order to file a declaration of candidacy and appear on the primary election ballot. . . .

WASH. ADMIN. CODE § 434-230-170, prior to the July 19, 2005 injunction, provided in part:

> AMENDATORY SECTION (Amending WSR 04-15-089, filed 7/16/04, effective 8/16/04)
>
> WAC 434-230-170 ((~~Electronic voting devices~~)) Ballot form. Each office on the ballot shall be identified, along with a statement designating how many candidates are to be voted on for such office. . . . Following the office designation the names of all candidates for that position shall be listed. . . . If the position is a partisan position, the party preference or independent status of each candidate shall be listed next to the candidate. The party preference must be listed exactly as provided by the candidate on the declaration of candidacy unless limited space on the ballot necessitates abbreviation or the party designation provided is, in the opinion of the county auditor, obscene. . . .

STATEMENT

In *California Democratic Party v. Jones*, 530 U.S. 567 (2000), this Court invalidated California's blanket primary election system as unconstitutionally burdening political parties' First Amendment rights of association and expression. This case turns on whether the First Amendment principles of *Jones* apply with equal force to Washington's "modified" blanket primary.[1]

In *Jones*, this Court ruled that state government is prohibited from forcing a political party to associate with non-party members at the critical stage of selecting its standard-bearer in the general election. Following this Court's decision in *Jones*, the Ninth Circuit struck down Washington's prior version of the blanket primary. *Democratic Party v. Reed*, 343 F.3d. 1198 (2003), *cert. denied*, 540 U.S. 1213, *cert. denied sub nom. Washington State Grange v. Washington State Democratic Party*, 541 U.S. 957 (2004).

Washington voters adopted Initiative 872 ("I-872") in 2004, creating a new partisan primary election for Washington State. This modified blanket primary continued the essential elements of the unconstitutional system that preceded it. It forced the Republican Party to have its standard-bearer for the general election chosen by unaffiliated and rival party voters and compelled the Republican Party to accept as candidates any individual who sought to appropriate the Party's name.

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[1] The Washington State Grange has filed an independent petition for writ of certiorari in Case No. 06-713.

The District Court expressly described I-872 as indistinguishable "[i]n all constitutionally relevant aspects" from the prior version of the blanket primary, and permanently enjoined its implementation. State App. 72a, 93a-96a. The Ninth Circuit concluded that I-872 continued the "constitutionally crucial" flaw of the old blanket primary, which severely burdened the parties' First Amendment rights. State App. 19a-20a.

Essentially, the State's petition asks this Court whether it really meant what it said in *Jones* and the rest of its long line of cases upholding the right of political parties to limit nonmembers' participation in the selection of the parties' standard bearers in the general election. *See, e.g., Eu v. San Francisco Democratic Comm.*, 489 U.S. 214 (1989); *Tashjian v. Republican Party*, 479 U.S. 208 (1986); *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981).

REASONS FOR DENYING THE PETITION

I. This Court Has Previously Declined to Review Washington's Prior, Constitutionally Indistinguishable Primary.

Washington provides no reason this Court should devote scarce judicial resources to review the Court of Appeals decision. I-872 is constitutionally indistinguishable from Washington's prior blanket primary, which the Ninth Circuit struck down based on this Court's clear statement of First Amendment principles in *Jones*. This Court twice declined to grant *certiorari* in that case. *See Reed*, 540 U.S. 1213; 541 U.S. 957.

The State's contention that "I-872 establishes a 'nonpartisan primary' exactly meeting the Court's description," Pet. at 11, is contradicted by I-872's express language, Washington's election administrators' official statements, and substantial portions of the rest of Washington election law. I-872 expressly applies only to primary elections for "partisan office": "Whenever candidates for partisan office are to be elected, the general election must be preceded by a primary conducted under this chapter." State App. 117a (I-872, § 7(2)).

In contrast to the State's insistence that "Initiative 872 eliminates the use of the primary to nominate political party candidates for office," Pet. at 9, Washington elections officials uniformly responded to inquiries regarding the initiative's effect on partisan nominations by stating that they were "not aware of any language associated with the Initiative that contemplates a partisan nomination process separate from the primary." Ct. App. ER 46-53.[2]

The notion that I-872 is a nonpartisan primary is further contradicted by numerous other provisions of Washington's election law. For example, the pre-primary election notice that county auditors are required to publish must contain "the proper party designation" of each

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[2] Equating "nomination" with "endorsement," the State concedes that I-872 eliminates the Party's right to nominate its candidates. Pet. at 9. This alone renders I-872 constitutionally defective: "The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee." *Jones*, 530 U.S. at 580. In *Reed*, the Ninth Circuit aptly noted that "[t]he right of people adhering to a political party to freely associate is not limited to getting together for cocktails and canapés. Party adherents are entitled to associate to choose their party's nominees for public office." *Reed*, 343 F.3d at 1204.

candidate. WASH. REV. CODE § 29A.52.311. "Major political party" status depends "at least one nominee for president, vice president, United States senator, or a statewide office receiv[ing] at least five percent of the total vote cast." WASH. REV. CODE § 29A.04.086. United States senator and partisan statewide offices are all subject to I-872. State App. 116a (I-872, § 4). A legislator's ability to raise campaign money depends, in part, on being a "member[] of a major political party in the state senate or state house of representatives." WASH. REV. CODE § 42.17.020(10); *see also* WASH. REV. CODE § 42.17.640(2). I-872 itself recognizes that the candidates advanced under the primary are "of" the Republican Party. State App. 123a (I-872, § 15(2)) (describing the effect of a vacancy upon "the term of the successor who is *of the same party* as the incumbent" (emphasis added)).[3]

The legislative history underlying the initiative also shows that compliance with this Court's description of a "nonpartisan blanket primary" in *Jones* was never the intent of I-872. Instead, the intent was to legislatively overrule the federal courts and re-institute the old blanket primary under a different name. The sponsor's initial press release announced: "Grange files initiative to *preserve* state's primary system." Ct. App. ER 512 (emphasis

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[3] The State incorrectly asserts that, under I-872, the only distinction between partisan and nonpartisan offices is the candidate's unilateral ability to associate with a political party. Pet. at 12, n.5. The offices are also distinguished by the process for filling vacancies and a candidate's ability to raise and spend campaign funds. *See, e.g.*, WASH. CONST. art. II, § 15 (a political party is entitled to fill vacancy in partisan office); State App. 123a (I-872, § 15(2)); WASH. REV. CODE §§ 42.17.020(10) & .640(2) (caucus political committees, made up of legislators who are members of a "major political party," may contribute greater sums in election campaigns).

added).[4] I-872's sponsor also described the initiative as a "modified blanket primary," Ct. App. ER 18, promising voters that the "new" primary would look and operate much like the old blanket primary. Ct. App. ER 22, 28. The text of I-872 itself confirms its purpose – permitting "the people" rather than the Republican Party to choose which candidate (if any) will carry the Republican standard in the general election:

> The Ninth Circuit Court of Appeals has threatened [the blanket primary] system through a decision, which, if not overturned by the United States Supreme Court, may require change. In the event of a final court judgment invalidating the blanket primary, this People's Choice Initiative will become effective. . . .
>
> This act takes effect only if the Ninth Circuit Court of Appeals' decision in *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003)[,] holding the blanket primary election system in Washington state invalid[,] becomes final and a Final Judgment is entered to that effect.

State App. 115a, 123a-124a (I-872, §§ 2, 18).

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[4] This Court will consider declarations of intent in evaluating the purpose of state laws impacting the First Amendment. *See Edwards v. Aguillard*, 428 U.S. 578, 586-87 (1987) (rejecting sham assertion of secular intent). Here the expressed intent of the initiative itself, as well as published statements by its sponsor, demonstrates its prohibited, invasive intent.

The official ballot statement in support of I-872 also makes clear that it did not create a "nonpartisan primary":

> Don't be forced to choose from only one party's slate of candidates in the primary.

Ct. App. ER 257. While modifying the former partisan blanket primary with wordplay, I-872 still enabled non-members to determine the identity of the Republican Party's standard-bearer. The sponsor contrasted the effect of I-872 with the primary election system enacted in response to the Ninth Circuit's decision in *Reed*:

> The September primary this year gave the state party bosses more control over who appears on our general election ballot at the expense of the average voter.

Ct. App. ER 257.

Washington's I-872 and California's Proposition 198, which established its former blanket primary, are similar in many respects. Both advanced similar "compelling interests." *Compare* State App. 114a-115a (I-872, § 2) (advancing the interests of voter privacy, participation, and choice) *with Jones*, 530 U.S. at 584 (advancing the interests, *inter alia*, of fairness, choice, participation, and privacy). Like Proposition 198, I-872 sought to ensure that candidates would appeal to a larger segment of the electorate: "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all voters." Ct. App. ER 257; *see also* Ct. App. ER 22-23 ("This proposed initiative will ensure that the candidates who appear on the general election ballot are those who have the most support from the voters, not just the support of the political party leadership."). In *Jones*, this Court responded that a State's interests in

> producing elected officials who better represent the electorate and expanding candidate debate beyond the scope of partisan concerns . . . are simply circumlocution for producing nominees and nominee positions other than those the parties would choose if left to their own devices . . . [and] reduce to nothing more than a stark repudiation of freedom of political association.

530 U.S. at 582.

Message modification was the intended result of both I-872 ("[Candidates] will not be able to win the primary by appealing only to party activists." Ct. App. ER 29) and Proposition 198 (forced association under the primary has "the *intended* outcome . . . of changing the parties' message." *Jones*, 530 U.S. at 581-82 (emphasis in original)). Observing the "obvious proposition" that the "voters who help select the nominees of parties they have chosen not to join often have policy views that diverge from the party faithful," *Jones*, 530 U.S. at 578, this Court stated that an inevitable effect of the primary was to cause candidates to modify their message. "In effect, [the blanket primary] has simply moved the general election one step earlier in the process, at the expense of the parties' ability to perform the basic function of choosing their own leaders." *Id.* at 580 (internal quotation marks omitted).

There is another notable similarity between I-872 and Proposition 198. Under I-872, "[a] primary is a first stage in the public process by which voters elect candidates to public office. . . . [Party affiliation] may in no way limit the options available to voters." State App. 117a-118a (I-872, § 7(1) & (3)). Likewise, California's blanket primary was "the first step by which the electorate as a whole, regardless of party affiliation, chooses its leaders." *California*

Democratic Party v. Jones, 984 F. Supp. 1288, 1293 (E.D. Cal. 1997).

The State asserts that I-872 is constitutionally distinguishable from Proposition 198 and Washington's prior blanket primary because it "winnows" rather than "nominates" candidates. Pet. at 13. This was the same defense offered by Washington in its *amicus curiae* brief to the Court in *Jones*. The State described "the winnowing of candidates for the general election" as the only "aspect of party associational activities affected by the blanket primary." Brief of the States of Washington & Alaska as *Amici Curiae* in Support of Respondents, 1999 U.S. Briefs 401 at *10. The Ninth Circuit rejected a similar argument in *Reed*: "As for the . . . argument that the party nominees chosen at blanket primaries 'are the "nominees" not of the parties but of the electorate,' that is the problem with the system, not a defense of it." 343 F.3d at 1204 (footnote marker omitted). In this case, the Ninth Circuit observed that any distinction between "winnowing" and "nominating" is not "illuminating" because they are "two sides of the same coin" and this Court used the terms interchangeably in *Storer v. Brown*, 415 U.S. 724, 734 (1974). State App. 18a, n.14.

If anything, I-872 poses an even greater threat than Proposition 198 to core First Amendment rights of political parties. Under its implementing regulations to the initiative, the State confirmed that I-872 granted any candidate an unrestricted right to appropriate the Republican Party name on a primary election ballot. The Ninth Circuit noted:

> The emergency regulations promulgated by the Washington Secretary of State in May 2005 confirmed the parties' inability to control who runs using their name: "neither endorsement by a political party nor a nominating convention are [sic]

> required in order to file a declaration of candidacy and appear on the primary election ballot." WASH. ADMIN. CODE § 434-215-015 (2005).[5]

State App. 23a, n.18. In addition, the State mandated that a candidate's "party preference . . . be listed [on the ballot] exactly as provided by the candidate on the declaration of candidacy." WASH. ADMIN. CODE § 434-230-170 (2005) (Ct. App. ER 377-78).

The following hypothetical illustrates the potential harm to the Republican Party under I-872. Assume that seven candidates file for office as "Republicans" and evenly split seventy percent of the primary election vote. Assume further that only two candidates file as "Democrats" and evenly split thirty percent of the vote. Under I-872, there would be no Republican on the general election ballot, despite "Republican" candidates receiving seventy percent of the primary vote. State App. 117a (I-872, § 7(2)).

II. The Ninth Circuit's Decision Regarding Forced Association With Candidates or Voters Follows This Court's First Amendment Jurisprudence.

The Ninth Circuit's decision follows a long line of Supreme Court cases upholding the right of political parties to exclude nonmembers (or to include unaffiliated voters) in selecting party nominees for public office. *See, e.g., Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *Tashjian v. Republican Party*, 479 U.S. 208 (1986); *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214 (1989); *Jones*, 530 U.S. at 575 ("[O]ur cases

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[5] The State neither cites nor comments on its emergency regulations in its petition.

vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'selects a standard bearer who best represents the party's ideologies and preferences.'") (quoting *Eu*, 489 U.S. at 224); *Clingman v. Beaver*, 544 U.S. 581, 595 (2005) (upholding state prohibition on crossover voting by members of rival parties in primary because "opening the . . . primary to all voters regardless of party affiliation would undermine the crucial role of political parties in the primary process").

Unaffiliated and rival party voters are not free to cross party lines to support a particular candidate at the expense of the associational right of political party adherents to select their standard bearer. A "nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." *Jones*, 530 U.S. at 583 (quoting *Tashjian*, 479 U.S. at 215-16, n.6). As in California, a "voter's desire to participate does not become more weighty simply because the State [of Washington] supports it." 530 U.S. at 583-84.

In rejecting California's defense of the blanket primary as "a rather pedestrian example of a State's regulating its system of elections," 530 U.S. at 572, this Court relied upon *La Follette*: "[W]hatever the strength of the state interests supporting the open primary itself, they could not justify [a] 'substantial intrusion into the associational freedom of members of the National Party.'" *Jones*, 530 U.S. at 576 (quoting *La Follette*, 450 U.S. at 126). California's blanket primary in *Jones*, Wisconsin's open primary in *La Follette*, Washington's blanket primary in *Reed*, and I-872's "modified" blanket primary all involve a "state-imposed burden" – the "intrusion by those with

adverse political principles upon the selection of the party's nominee." 530 U.S. at 576, n.7 (internal quotation marks omitted).

In *La Follette*, Democratic Party rules prohibited unaffiliated voters' participation in its presidential nomination process. Wisconsin sought to compel the Democratic Party to seat delegates to the Party's national convention who were chosen through an open primary, in which voters did not declare their party affiliation. The Party's rules prevailed over the contrary state statute: "It is for the National Party – and not the Wisconsin Legislature or any court – to determine the appropriate standards for participation in the Party's candidate selection process." *La Follette*, 450 U.S. at 124.

In *Tashjian*, Republican Party rules permitted independent voters to vote in Republican primaries. Connecticut required voters in any party primary to be registered members of that party. Again, the conflict was resolved in favor of the Party rule: "The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." *Tashjian*, 479 U.S. at 224.

Although the primary election systems in *La Follette* and *Tashjian* differed from each other and from California's blanket primary, this Court explicitly adopted the principles underlying both *La Follette* and *Tashjian* in *Jones*. The selection of a standard bearer by a political party is fundamental to its existence, and a State may not substitute its judgment for that of the political party in determining whether the party's message is advanced by the participation of unaffiliated voters, or not. *See Jones*, 530 U.S. at 581-82.

Clingman confirmed the important role that parties play and affirmed the validity of Oklahoma's prohibition of cross-over voting in a primary. Yet, forcing the Republican Party to associate with unaffiliated and rival party voters and accept cross-over voting is what I-872 is all about.[6]

Forced association with candidates seeking to appropriate the Republican Party mantle is also prohibited. "[B]eing saddled with an unwanted, and possibly antithetical, nominee would [ordinarily] . . . severely transform [a party]." *Jones*, 530 U.S. at 579. There is no principled distinction between being able to determine the scope of association with respect to voters selecting the Republican nominee, and candidates seeking to be that nominee. "[I]t is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views." *Jones*, 530 U.S. at 575. If the Party and its adherents consider a prospective candidate to be anathema to their views, he could hardly be the ambassador of those views.[7]

The Ninth Circuit has joined the District of Columbia and Eleventh Circuits in directly addressing the ability of candidates to foist themselves, unwanted, on a political

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[6] "Don't be forced to choose from only one party's slate of candidates in the primary." Ct. App. ER 257.

[7] In related First Amendment contexts, this Court has upheld the right of an association to exclude messages (and messengers) that the association deems inconsistent with its message. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995) (parade organizers had the right to exclude group whose message was deemed inconsistent by organizers, notwithstanding contrary state statute); *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000) ("As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression.").

party, and all have affirmed the right of the party to determine the scope if its association. In *LaRouche v. Fowler*, 152 F.3d 974, 995-96 (D.C. Cir. 1998), the court observed:

> [I]t is the *sine qua non* of a political party that it represents a particular political viewpoint. And it is the purpose of a party convention to decide on that viewpoint, in part by deciding which candidate will bear its standard: the liberal or the conservative, the free trader or the protectionist, the internationalist or the isolationist.
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> * * *
>
> The Party's ability to define who is a "bona fide Democrat" is nothing less than the Party's ability to define itself.

Segregationist David Duke and his supporters have twice sought to compel the Republican Party to accept him as a candidate, even though his views are anathema to the Party, and twice the Eleventh Circuit rejected his claim. *See Duke v. Cleland*, 954 F.2d 1526 (1992); *Duke v. Massey*, 87 F.3d 1226, 1233, 1234 (11th Cir. 1996) ("Duke supporters do not have a First Amendment right to associate with him as a Republican Party presidential candidate. . . . Duke does not have the right to associate with an 'unwilling partner.'"). Instead, the Eleventh Circuit held that "[t]he Republican Party has a First Amendment right to freedom of association and an attendant right to identify those who constitute the party based on political beliefs." *Massey*, 87 F.3d at 1234.

In this case, the Ninth Circuit addressed the concern that I-872 enabled candidates to express their party "preference" on the ballot, "notwithstanding the political parties' unwillingness to associate with a particular

candidate or nominate that person as a standard bearer," State App. 24a, n.19:

> The Initiative thus perpetuates the "constitutionally crucial" flaw *Jones* found in California's partisan primary system. Not only does a candidate's expression of a party preference on the ballot cause the primary to remain partisan, but in effect it forces political parties to be associated with self-identified candidates not of the parties' choosing. This constitutes a severe burden upon the parties' associational rights.

State App. 19a-20a.[8]

III. Wherever the First Amendment Boundary Between Permissible and Impermissible State Regulation of Primary Elections May Lie, I-872's Forced Association with Unaffiliated Voters and Candidates Is Impermissible.

Regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest. *Clingman*, 544 U.S. at 586. The State's petition offers no compelling interests justifying I-872, but its severe burden on the Republican Party is indisputable.

I-872 forces the Republican Party to associate with both voters and candidates who may not share its positions or goals, and who may, in fact, be actively opposed to the Party's principles. Changing the Republican message

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[8] This Court has recognized that a political party does not have the unilateral right to identify a candidate as its nominee. The association must be mutual. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359-60 (1997).

by changing the candidates carrying the Republican name in the general election was the expressed intent of I-872. "This proposed initiative will ensure that the candidates who appear on the general election ballot are those who have the most support from the voters, not just the support of the political party leaders." Ct. App. ER 22-23. "[F]orced association has the likely outcome – indeed, in this case the *intended* outcome – of changing the parties' message. We can think of no heavier burden on a political party's associational freedom." *Jones*, 530 U.S. 581-82.

CONCLUSION

This Court has already provided clear, consistent guidance on the limits of state power to compel political parties to include rival party or unaffiliated voters when selecting their standard-bearers. I-872 forces the Republican Party to have its standard-bearer in the general election selected by persons who are, at best, wholly unaffiliated with the party and, at worst, active affiliates of a rival party.

This Court has also provided clear guidance on the right of associations to determine the scope of their association, and to exclude those *the association* defines as outside it. The lower courts have consistently held that the right of association permits political parties to exclude candidates who might wish to assume the party mantle.

Both the Ninth Circuit and the District Court understood this Court's decisions. Any confusion the State may

have is of its own making, and a further opinion would provide no greater clarity.

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